INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	9

CITATIONS

Cases:	
Jones v. *United States*, 362 U.S. 257	6
Roviaro v. *United States*, 353 U.S. 53	7
Scher v. *United States*, 305 U.S. 251	7
Statutes:	
18 U.S.C. 3109	2, 6

676288—63

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 756

ORION T. WHITING, JR., and LUCRETIA KILLINGS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–12a) is not yet reported. The opinion of the district court on the motion for a new trial appears in the record (I R. 12–16).[1]

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1962. The petition for a writ of certiorari was filed on January 18, 1963. The juris-

[1] "I R." refers to the appellant's appendix, "II R." to the government's appendix in the court of appeals.

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the affidavit in support of the search warrant was sufficient.

2. Whether the search warrant was properly executed.

3. Whether various procedural rulings of the district court were proper.

4. Whether the evidence supported petitioner's convictions for wagering tax violations.

STATUTE INVOLVED

18 U.S.C. 3109 provides as follows:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioners were convicted on all four counts of an information charging various violations of the wagering tax law. Petitioner Whiting was sentenced to imprisonment for one year and a $10,000 fine. Petitioner Killings was sentenced to imprisonment for 181 days and a fine of $1,000 (I R. 2–4, 90). The court of appeals affirmed (Pet. App. 1a–12a).

1. Petitioners filed a pre-trial motion to suppress evidence seized under a search warrant, alleging that the affidavit in support thereof was not based upon the personal information of the affiants, did not identify the alleged source of information and did not state facts sufficient to support the inference that petitioners were engaged in business as principals, and that the warrant was illegally executed by the officers' breaking the door without announcing their authority (I R. 5–7). After a hearing the motion was denied (I R. 9). The motion was renewed at the trial, but the court indicated that it would adhere to the prior ruling unless new evidence was offered (I R. 59–60). The pertinent testimony may be summarized as follows:

a. The affidavit for search warrant, executed by special agents Ridolfi and Bedingfield of the Internal Revenue Service, stated that they were assigned to the case after information from a source previously proved reliable had been received that petitioner Whiting and others were engaged in a numbers lottery; that the wagers were transported by automobile to a described house located on Leeland Road in Prince George's County, Maryland; that the files of the Metropolitan Police Department contained many complaints that Whiting was a "backer" in the numbers racket; that several years previously Whiting had applied for an occupational tax stamp for wagering, which was refused because he did not supply full information; that an investigation of crime in the District of Columbia in the United States Senate had

developed that Whiting was in the numbers business (II R. 1–2).

The affidavit further alleged that, on several different days in June 1960, the agents observed the movements of petitioners, which followed a consistent pattern: About 3:00 p.m., Whiting would pick up petitioner Killings near Fourteenth Street and Saratoga Avenue, Northeast, in Washington; they would then drive to a shopping area in Suitland, Maryland, and park a block away from another automobile driven by Carl Wilson, a known gambler. A girl would get out of Wilson's car, carrying a large brown paper bag and go to petitioners, who would drive her to the Silver Hill Road intersection and let her out, minus the paper bag. Petitioners would then proceed to the house on Leeland Road and disappear into the garage. The records of the Internal Revenue Service did not show that any wagering occupational tax stamp for the current year had been issued to any of the parties named (II R. 2–7).

b. As to the execution of the search warrant, a deputy marshal testified that he, another deputy, and three Internal Revenue agents went to the premises, a brick home which had a screen door at the front entrance. The deputy marshal rapped on the front door and in a loud, clear voice announced that he was a United States marshal with a search warrant (II R. 25, 33). One of the agents shouted a moment later (II R. 25, I R. 46). People were noted scurrying around on the second floor and the deputy marshal

shouted for some one to come down and open the door (II R. 26, 28, 29, 36; I R. 41). After waiting some time to give someone an opportunity to come (II R. 12, 28), the officers punched a hole through the screen and unlatched the door. The wooden door was open (II R. 26–27, I R. 46).

The owner of the house, a Mrs. Proctor, who was not actually living in the house (I R. 39), testified that she had come over to sit on a side porch and was joined by her daughter-in-law (I R. 37, 39). While they were there, a man came around to the porch from the outside with his hand on his gun and said, "Don't move." The witness heard someone at the front door and wanted to let whoever it was in, but the man told her not to move. She did start to go, but her daughter told her not to (I R. 37, 40–41).

The officer who approached Mrs. Proctor said that he had his hand on his gun because a dog at the side of the house had growled at him. He told the women to sit down, that there was a federal raid in progress. He heard the officers call that they were federal officers with a search warrant. When they called the second time without apparent response, he told Mrs. Proctor to go and open the door, but then he heard them entering (II R. 32–33). The officers went upstairs and found petitioners and a large quantity of gambling paraphernalia of a type normally found in the bank of a numbers operation (I R. 47–48).

2. The trial developed the facts as to the daily movements of petitioners in the manner described in the affidavit (II R. 49–57). The paraphernalia seized

included adding machines, a large number of numbers slips, an empty paper bag approximately the size of those which were daily observed and another paper bag with a date on it (II R. 57–64). An analysis of the numbers slips showed an average daily business of approximately two thousand dollars and indicated that there were about sixty-five writers turning in slips (II R. 91–92).

ARGUMENT

1. The affidavit for the search warrant was clearly sufficient. Information that petitioners were engaged in gambling was corroborated by the officers' personal observations of the activities of petitioners, which were consistent with their operation of a gambling enterprise. See *Jones* v. *United States*, 362 U.S. 257, 267–272.

2. The evidence is clear that the officers did make an announcement of their office and purpose before breaking open the door. The officers waited some time before breaking open the door because they did see someone on the second floor of the house (II R. 28, 29, 36).[3] Under these circumstances, as the courts below held, the officers properly complied with 18 U.S.C. 3109 (see p. 2, *supra*).

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[3] We do not see how the situation is altered by the evidence (see p. 5, *supra*) that an officer directed the two women sitting on the side porch, who did not actually live in the house, to refrain from opening the front door, since the actual occupants of the house, who were obviously more directly concerned with the raid, were given an opportunity to respond to the officers' announcement of identity and purpose.

3. (a) At the hearing on the motion to suppress (see I R. 9) and at the trial (I R. 58) petitioner sought the names of the informants whose information had sparked the investigation. Petitioner's counsel admitted that the names were not necessary to enable the defendant to put on a defense (I R. 61). Since the information received merely stimulated an investigation and was confirmed by other evidence, notably the personal observations of the officers, the court properly ruled that the names of the informants did not have to be disclosed. *Scher* v. *United States*, 305 U.S. 251, 254; see *Roviaro* v. *United States*, 353 U.S. 53, 59.

(b) By a motion before trial designated as a "plea in bar," petitioner Whiting claimed that the information against him should be dismissed. He based this contention on the fact that in November 1951 (1) an application for a wagering tax stamp was filed on behalf of Whiting and returned because unsigned and incomplete and (2) Whiting had paid $2,400 for the 10 percent tax on wagers accepted (II R. 38–40). Obviously the rejection of an incomplete application in 1951 and the payment of taxes in that year did not give Whiting immunity from paying taxes on his 1960 activities.

(c) At the hearing on the motion to suppress, Agent Ridolfi, one of the agents applying for a search warrant, testified that the other agent, Mr. Bedingfield, had received information that petitioners were operating a numbers business in Maryland. When asked whether the information the agent had re-

ceived related to the two, or just Whiting, he answered "Mr. Whiting was operating the business and Miss Killings was helping him, she was an employee of his, I presume, she was helping him out" (II R. 20). At the trial, agent Ridolfi was asked whether in connection with his investigation he had formed or theretofore expressed an opinion as to whether Mrs. Killings was a banker or employee. The court ruled the question improper (I R. 71), as it clearly was. The agent was being asked to testify, not as an expert based on the evidence at the trial, but merely as to his prior statement, which related solely to the content of certain information another agent had received.

4. The evidence was sufficient to support the verdict of the jury that both petitioners were actively engaged in the business of accepting wagers without paying the required tax. The slips picked up at the time the search warrant was executed showed business of approximately $2,000 a day, involving about 65 writers. Whiting obviously knew about the tax stamp requirement since he had tried to obtain a stamp in 1951, and Mrs. Killings admitted that she knew of the requirement (II R. 78). The jury were carefully told to acquit unless they found that the defendants "were respectively engaged in the business as bankers or writers, accepting wagers from others or in some proprietary way" (II R. 114). The evidence against petitioners was substantially the same and nothing was offered to suggest that one was in a position inferior to the other.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

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